IN THE COURT OF APPEAL, MALAYSIA AT PUTRAJAYA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO: B-05(M)-265-06/2017

BETWEEN

M. GUNALAN A/L MUNIANDY … APPELLANT

AND

PUBLIC PROSECUTOR … RESPONDENT

[In the Matter of High Court in Malaya at Shah Alam
Criminal Trial No: 45A-116-10/2015

Between

Public Prosecutor

And

M. Gunalan a/l Muniandy]

CORAM:

KAMARDIN HASHIM, JCA
MOHAMAD ZABIDIN MOHD DIAH, JCA
YEW JEN KIE, JCA

JUDGMENT OF THE COURT

Introduction

[1] The appellant was charged and tried in the High Court at Shah Alam with an offence of trafficking in dangerous drugs under the Dangerous Drugs Act, 1952 ('the Act'). The charge reads as follows:

> *"Bahawa kamu pada 15.2.2015, jam lebih kurang 3.45 petang, bertempat di kawasan Perlepasan Domestik LCCT, KLIA 2, di dalam Daerah Sepang, di dalam Negeri Selangor Darul Ehsan, telah mengedar dadah berbahaya iaitu Methamphetamine seberat 377.2 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama."*

[2] At the conclusion of the trial, the learned High Court Judge ('learned trial judge') found the appellant guilty and convicted him on the said charge. The appellant was thus sentenced to the mandatory death penalty as mandated under section 39B(2) of the Act.

[3] Aggrieved with the conviction and sentence, the appellant appealed to this Court. We heard the appeal on 23.4.2019, wherein at its conclusion, we unanimously allowed the appeal partly. These are our grounds in doing so.

The prosecution's case in brief

[4] Briefly, the prosecution's case may be summarised as follows. On 15.2.2015 at around 3.45 p.m., one Constable Zulhilmi bin Khairudin (PW3)

while on surveillance duty at the Domestic Departure Hall, Low Costs Carrier Terminal, KLIA 2, Sepang, saw the appellant behaving suspiciously. At that time, the appellant had a sling bag (P17) and was dragging a trolley bag (P18).

[5] PW3 approached and detained the appellant. PW3 then asked the appellant to scan his bags but nothing suspicious was seen.

[6] His bags were then examined. In the trolley bag (P18), PW3 found a bottle with the words "JOHNSON'S BABY POWDER" printed on it (P11A). PW3 discovered that P11A was heavier than expected which arose his suspicious. On closer examination of P11A, PW3 discovered it contained crystal substance which were later formed the subject matter of the charge. The type and weight of the impugned drugs were never disputed by the appellant.

***Prima facie* case**

[7] At the close of the prosecution case, the learned trial judge found that a *prima facie* case had been established against the appellant. As we alluded to earlier, the subject matter was a dangerous drugs viz. Methamphetamine weight 377.2 grammes was not disputed.

[8] As for the element of possession, based on the factual matrix of the case that the appellant was detained by PW3, he was pulling a trolley bag P18 from where the impugned drugs were recovered, the learned trial judge held that the appellant was having under his custody and control of the bag P18 and the impugned drugs inside the said bag. Coupled with the conduct of the appellant behaving suspiciously which is relevant and

accepted under section 8 of the Evidence Act 1950, the learned trial judge invoked the statutory presumption under section 37(d) for the element of possession and knowledge of the impugned drugs.

[9] As for the element of trafficking, the learned trial judge invoked the statutory presumption under section 37(da)(xvi) of the Act due to the weight of the impugned drugs involved which is more than the minimum of 50 grammes of Methamphetamine to trigger the rebuttable presumption against the appellant. The learned trial judge was of the view that by virtue of the new provision under section 37A of the Act which came into force on 15.2.2014, before the date on which the appellant in this appeal was charged, allowed double presumption to be invoked as against the appellant.

The Defence

[10] The appellant elected to give evidence under oath. The appellant was the sole witness for the defence. We reproduce below the gist of his defence as set out by the learned trial judge in his grounds of judgment:

> "(i) sebelum ditangkap, dia bekerja di Syarikat 'Finance' sebagai penarik kereta. Dia dibayar gaji RM2,000.00 sebulan. Pada hari kejadian, dia berada di KLIA 2 kerana untuk menemani bapa saudaranya (SP6) bercuti ke Miri, Sarawak. Menurutnya sebelum ini dia telah dua kali ke Miri dan ke Bintulu sekali, bercuti menemani bapa saudaranya juga.
>
> (ii) Di hari kejadian, dia telah ditahan selepas dia 'scan' bagasinya. Dia mengesahkan yang masa ditahan, dia ada membawa sebuah beg. Beg P18 disahkan beg yang dibawanya. Menurutnya beg tersebut dia pinjam dari bosnya bernama Mr. Lim. Dia telah ambil beg tersebut dari Mr. Lim

di Restoran Asoka, Klang pada 15.2.2015 jam 11.00 pagi. Dia meminjam beg dari Mr. Lim atas keperluan segera.

(iii) Selepas terima beg, dia terus balik ke rumah. Dia tidak periksa beg tersebut. Selepas mengambil baju-bajunya di rumah, dia terus ke airport. Baju-bajunya telah dimasukkan ke dalam beg sewaktu ditempat parking airport. Apabila memasukkan pakaian, dia ada lihat botol bedak dan lotion di dalam beg P18 tersebut.

(iv) Dia menafikan yang botol bedak dan lotion itu sebagai miliknya. Dia tidak tahu isi kandungan kedua-dua barang tersebut. Selepas makan dengan bapa saudaranya, Suresh (SP6) di Sepang, mereka langsung menujui ke airport.

(v) Dia menyatakan yang dia tidak cuba melarikan diri semasa ditahan. Dia juga tidak menghalang polis dari memeriksanya. Dia menyatakan yang dia tidak rasa takut, gelisah atau curiga. Sewaktu di Balai Polis, dia ada beritahu polis yang beg P18 itu milik Mr Lim. Juga, dia ada beritahu polis yang botol bedak dan lotion itu milik Mr. Lim.

(vi) Semasa soal balas, dia nafikan yang pada hari kejadian, dia ingin ke Bintulu. Dia nafikan yang tujuan dia ke Sarawak itu adalah untuk hantar dadah dengan terima upah RM2,000.00. Dia nafikan di akhir Januari, 2015 dia telah mendapat bekalan dadah dari Pandian. Dia tidak setuju atas cadangan dari pihak pendakwaan yang dia telah menyimpan pakaiannya berserta botol-botol bedak itu di dalam beg P18. Untuk pemergiannya ke Sarawak sebelum ini pakaian-pakaiannya disimpan di dalam beg bapa saudaranya. Di hari kejadian, beg P18 dibawa tangan sahaja (hand carry)."

[11] After considering the appellant's version of his defence, the learned trial judge found that the appellant had failed in raising any reasonable doubt on the prosecution's case. The learned trial judge categorised the

appellant's defence that he had no knowledge of the impugned drugs as recent invention, bare denial and an afterthought. The learned trial judge rejected the appellant defence of no knowledge.

[12] The learned trial judge also found that the appellant had failed to rebut both the statutory presumptions under section 37(d) and (da) of the Act on the balance of probabilities. The appellant was thus convicted and sentenced to suffer the mandatory death penalty as mandated under section 39B(2) of the Act. Hence, the appellant's appeal before us.

The Appeal

[13] Before us, learned counsel for the appellant canvassed the following two main issues:

(a) That the learned trial judge erred when his Lordship invoked both the section 37(d) and section 37(da) presumptions against the appellant; and

(b) That the learned trial judge was uncertain in his findings as to the elements of possession and trafficking.

[14] On the issue of double presumption, the learned counsel relied on the latest decision of the Federal Court's case of **Alma Nudo Atenza v. PP & Another Case** [2019] 1 LNS 437 which the apex court held that section 37A of the Act which allowed the application of double presumption to be unconstitutional for violating Article 5(1) read with Article 8(1) of the Federal Constitution. Thus, the impugned section (section 37A) of the Act was struck down.

[15] On the issue of uncertainty in the learned trial judge's findings, learned counsel relied on this Court's decision in **Mohamad Hanafi Mohamad Hashim lwn. PP** [2016] 6 CLJ 378 where this Court set aside the conviction on the ground that the learned trial judge had misdirected himself by way of non-direction resulting in uncertainty and confusion on his findings against the two main elements of the charge which had prejudiced the appellant.

[16] Based on the two complaints, the learned counsel urged us to reverse the finding of the learned trial judge and to set aside the conviction and sentence imposed on the appellant.

Our Decision

[17] We had the opportunities of perusing the appeal records and the learned trial judge's grounds of judgment. We find there are merits in the learned counsel's two complaints. We agreed with learned counsel that the learned trial judge had invoked the double presumptions against the appellant to prove the two main elements of the charge, namely, possession and trafficking.

[18] We observed that at pages 21 to 22 of the Appeal Record Volume 1, his Lordship said:

> "Keterangan saksi-saksi pendakwaan amat jelas. Dalam keadaan itu saya berpuas hati bahawa Tertuduh mempunyai jagaan dan kawalan (custody and control) beg troli yang di dalamnya dijumpai botol P11A yang mengandungi Methamphetamine itu dan oleh itu anggapan (d) s. 37 Akta Dadah Berbahaya 1952 berbangkit. Seterusnya, oleh sebab berat

Methamphetamine itu melebihi 50 (sic) gram anggapan (da) di bawah seksyen yang sama juga berbangkit."

[19] We agreed with the learned counsel that the approach taken by the learned trial judge was erroneous as decided recently by the Federal Court in **Alma Nudo Atenza v. PP & Another Case** (supra). Nevertheless, we are not with the learned counsel in asking for an outright acquittal of the appellant on the similar reason given by the Federal Court in Alma Nudo.

[20] The Federal Court's reasoning, which are binding on us, as follows:

"150. Based on the factors above – the essential ingredients of the offence, the imposition of a legal burden, the standard of proof required in rebuttal, and the cumulative effect of the two presumptions – we consider that section 37A constitutes a most substantial departure from the general rule, which cannot be justified and disproportionate to the legislative objective it serves. It is far from clear that the objective cannot be achieved through other means less damaging to the accused's fundamental right under Article 5. In light of the seriousness of the offence and the punishment it entails, we find that the unacceptably severe incursion into the right of the accused under Article 5(1) is disproportionate to the aim of curbing crime, hence fails to satisfy the requirement of proportionality housed under Article 8(1).

151. Accordingly, we hold that section 37A is unconstitutional for violating Article 5(1) read with Article 8(1) of the FC. The impugned section is hereby struck down.

152. Having struck down section 37A of the DDA the question now is to determine the position of the Appellants. The learned trial Judges in these two appeals invoked both the presumptions in finding the

guilt of the Appellants. Since there was no challenge to the use of a single presumption in these appeals we are of the view that the invocation of subsection 37(d) by the learned trial Judges did not cause any miscarriage of justice to the detriment of the Appellants.

153. Hence, we hereby quash the convictions and sentences of both the Appellants under section 39B of the DDA. As we have no reasonable doubt on the guilt of the Appellants for possession of the drugs based on the evidence adduced we hereby substitute their respective convictions to one of possession under section 12 (1) and punishable under section 39A(2) of the DDA."

[21] On the second complaint by the learned counsel, we as well agreed with learned counsel that the learned trial judge had misdirected himself by way of non-direction on his findings against two main elements of the charge. These, as evinced from the learned trial judge's grounds of judgment, which we reproduce below: (pages 18 – 19 of the Appeal Record Volume 1)

"Berdasarkan keterangan-keterangan tersebut adalah jelas bahawa Tertuduh mempunyai milikan terhadap dadah-dadah yang dirampas tersebut.

Di dalam kes ***PP v. Denish Madhavan [2009] 2 CLJ 209 FC***, diputuskan:

"It is clear that what is important in the elements to constitute possession is that once the elements needed to constitute possession are established, including the element of exclusive power to deal, then what is established is possession, not exclusive possession."

Perbuatan Tertuduh yang membawa dadah tersebut di dalam beg troli P18 adalah terjumlah kepada perbuatan pengedaran sebagaimana yang didefinasikan di bawah Seksyen 2, Akta Dadah Berbahaya, 1952, iaitu membawa. Adalah memadai seandainya dapat dibuktikan yang Tertuduh mengangkut dadah tersebut dari satu tempat ke satu tempat yang lain bagi membuktikan perbuatan mengedar.

Tertuduh bukan setakat membawa atau menyimpan dadah berbahaya berkenaan tetapi, *"whether he is a trafficker in those circumstances depend on the facts and circumstances of the given case, including the quantity of the drugs and any transaction the accused proposed to enter into".* (Lihat kes ***Mohamad Yazri Minhat v. Public Prosecutor [2003] 2 CLJ 65 p 75***).

Memandangkan jumlah dadah yang dibawa oleh Tertuduh adalah satu jumlah yang besar iaitu 377.2 gram, maka adalah sesuatu yang tidak dapat disangkalkan bahawa Tertuduh membawa dadah tersebut untuk tujuan pengedaran. (***Ong Ah Chuan v. PP [1981] 1 MLJ 64***)

……..

Manakala di dalam kes Mohamad ***Yazri Minhat v. Public Prosecutor (supra)***, diputuskan:

> *"As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it."*

Dari fakta dapat digarab bahawa berdasarkan kepada cara dadah tersebut dibawa dan jumlah dadah yang agak besar, maka "irresistible inference" boleh dibuat berdasarkan kepada "common sense approach"

bahawa Tertuduh sememangnya berniat untuk mengedarkan dadah berbahaya tersebut.

Lantas, pihak pendakwaan diputuskan telah berjaya membuktikan bahawa Tertuduh telah melakukan perbuatan mengedar dadah berbahaya.

Perbuatan Tertuduh tersebut adalah termasuk dibawah definisi pengedaran seperti yang termaktub dibawah Seksyen 2 Akta Dadah Berbahaya, 1952."

[22] However, as we alluded to earlier, at pages 21 – 22 of his grounds of judgment, his Lordship invoked the double presumptions approach. We also observed that, at the end of the case, the learned trial judge had failed to decide as to whether the presumptions had been rebutted or not on the balance of probabilities.

[23] In **Mohamad Hanafi Mohamad Hashim** (supra), the conviction was set aside as it was rendered unsafe not only that there was misdirection by the learned trial judge but also the failure of the learned trial judge to adequately assess the appellant's defence which tantamount to a misdirection as it was a non-compliance of the requirement of section 182A of the Criminal Procedure Code. We are of the considered view that the case cited by learned counsel can be distinguish from the instant appeal before us.

Conclusion

[24] For all the reasons adumbrated above, and following the Federal Court's decision in **Alma Nudo Atenza v. PP & Another Case** (supra), we

allowed the appellant's appeal in part. The conviction and sentence of the High Court is set aside. We substituted it with an order of conviction for an offence of possession under section 12(2) and punishable under section 39A(2) of the Act.

[25] After hearing the parties, we imposed 12 years imprisonment to run from the date of arrest, i.e. 15.2.2015 and the minimum 10 strokes of whipping on the appellant.

[26] We so ordered.

Dated: 13 June 2019

signed
(KAMARDIN BIN HASHIM)
Judge
Court of Appeal
Malaysia

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